91-1618

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, Speaker Pro Tempore
of the Ohio House of Representatives, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether the district court erroneously held that state reapportionment officials must, as a prerequisite to redistricting, conduct a totality of circumstances analysis adopted by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Whether the district court erroneously shifted the burden of proof from plaintiffs attacking legislative districts as diluting minority voting strength to defendant reapportionment officials by requiring them to prove a violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, prior to the creation of any minority controlled state legislative districts.

Whether the district court's finding of a violation of § 2 of the Voting Rights Act is erroneous.

Whether the district court erroneously enjoined the primary election for members of the Ohio General Assembly and appointed a special master to redraw Ohio's state legislation districts without first affording defendants a reasonable opportunity to adopt substitute districts.

Whether the district court's finding of a violation of the Fifteenth Amendment is erroneous.

Whether the district court's finding of a violation of the Fourteenth Amendment is erroneous.

LISTING OF ADDITIONAL PARTIES

Appellants

STANLEY J. ARONOFF, President of the Ohio Senate, ROBERT A. TAFT, II, Secretary of State of Ohio, and JAMES R. TILLING, Chief Executive Officer of the Ohio Senate.

Appellees

THOMAS E. FERGUSON, Auditor of State of Ohio, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, CLARENCE LUMPKIN, TYRONE RILEY, RICHARD CORDRAY, Representative of the 33rd Ohio House District, PAUL MECHLING, Representative of the 91st Ohio House District, RONALD GERBERRY, Representative of the 71st Ohio House District, MARY ABEL, Representative of the 94th Ohio House District, and WILLIAM MALLORY, Representative of the 23rd Ohio House District.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The January 31, 1992 Opinion and Order of the three-judge court has not yet been officially reported. It was filed in the United States District Court for the Northern District of Ohio, Eastern Division, in case number 5:91CV-2219, and is set out in the accompanying Appendix at App. 1a. "Appendix 2" to Judge Dowd's dissenting opinion was filed on February 3, 1992, and is set out in the accompanying Appendix at App. 47a.

The February 18, 1992 Findings and Conclusions of the Ohio Apportionment Board, on remand following the January 31, 1992 Opinion and Order of the three-judge

court, were filed with the United States District Court for the Northern District of Ohio, Eastern Division, in case number 5:91CV-2219, and are set out in the accompanying Appendix at App. 160a.

The March 10, 1992 Order of the three-judge court has not yet been officially reported. It is set out in the accompanying Appendix at App. 118a.

The March 19, 1992 Findings of Fact, Supplemental Memorandum of Law, and Order of the three-judge district court has not yet been officially reported. It is set out in the accompanying Appendix at App. 127a.

The March 31, 1992 Order of the three-judge district court has not yet been officially reported. It is set out in the accompanying Appendix at App. 324a.

JURISDICTION

The Orders appealed from were filed on March 10, 1992, March 19, 1992, and March 31, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the text of constitutional, statutory, and other provisions involved in this case is set out in the accompanying Appendix at App. 274a.

STATEMENT OF THE CASE

On March 10, 1992, the three-judge court in this case, convened pursuant to 28 U.S.C. § 2284(a), in a two-to-one decision, enjoined the 1991 plan of apportionment for members of the Ohio General Assembly and appointed a special master to reconfigure the districts. In addition, the district court enjoined the May 5, 1992, Ohio primary and established June 2, 1992, as the date of the new election:

> Accordingly, the date of May 5, 1992 for the holding of the Ohio primary election is vacated to the extent that candidates for election to the General Assembly are concerned, and the appropriate election officials are enjoined and directed to cause such primary election to be held on June 2, 1992, provided, however, that on proper showing the court may provide an alternate date.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 119a-120a (N.D. Ohio March 10, 1992) (*per curiam*). It is this Order, as well as the Orders of March 19, 1992, and March 31, 1992, from which Appellants have appealed.[1] In its Order of March 10, 1992, the district court concluded that the 1991 plan of apportionment for members of the Ohio General Assembly violated § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and the Fifteenth Amendment to the United States Constitution. In its Order of March 19, 1992, the court further concluded that the plan violated the Fourteenth Amendment. In the Order of March 31, 1992, the district court further postponed the primary election for members of the Ohio General Assembly to September 8, 1992.[2]

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[1] Appellants Voinovich, Aronoff, and Taft are three of the five "persons responsible for the apportionment of [the State of Ohio] for members of the General Assembly." Ohio Const., Art. XI, § 1. Appellant Tilling is the Secretary to the Apportioning Persons. Plaintiffs-Appellees Thomas E. Ferguson, Auditor of State of Ohio ("Ferguson") and Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives ("Quilter"), are the remaining two apportioning persons. Plaintiffs-Appellees Richard Cordray, Paul Mechling, Ronald Gerberry, Mary Abel, and William Mallory are incumbent Democratic Members of the Ohio House of Representatives. The remaining Plainitffs-Appellees are largely Democratic party appointees who were recruited by William Pfeiffer, Chief Executive Officer to the Speaker of the Ohio House of Representatives, to serve as plaintiffs in this case (collectively, "Appellees").

[2] In part because of the district court's earlier order setting June 2, 1992 as the date for the primary election for members of the General Assembly, the state moved the entire Ohio primary to

Appellees commenced this action on November 1, 1991 in the United States District Court for the Northern District of Ohio. Chief Judge Merritt of the United States Court of Appeals for the Sixth Circuit appointed Circuit Judge Nathaniel R. Jones and Senior Circuit Judge John W. Peck to the three-judge panel designated to hear the case. District Judge David D. Dowd, Jr. was the third member of the three-judge court.[3]

On November 14, 1991, the District Court advised counsel that this case would be tried on December 3, 1991. Appellants had not yet filed an answer in the case, and under Fed.R.Civ.P. 12(a), were not required to do so before November 21, 1991. On November 22, 1991, Judge Dowd conducted a status conference and advised counsel that evidence was to be submitted by affidavit or deposition. The Court indicated that it would hear no live testimony.

June 2, 1992. As noted in the Affidavits of Secretary of State Taft and Chief Elections Counsel John F. Bender, submitted in support of Appellants' Application for Stay, the holding of two primaries will cost the state approximately six million dollars. Because the district court has now moved the primary for members of the General Assembly to September 8, 1992, unless this Court grants Appellants' Application for Stay, the state will incur this unnecessary expenditure.

[3] Prior to the commencement of this case, Appellants Voinovich, Aronoff, and Taft had commenced an original proceeding in the Ohio Supreme Court concerning the 1991 reapportionment. On February 14, 1992, after the litigation completed its tortuous path through the United States District Court for the Southern District of Ohio and the United States Court of Appeals for the Sixth Circuit, the Ohio Supreme Court issued a decision in which it concluded that the plan of apportionment was constitutional under the Ohio Constitution, specifically declaring valid the districts which the district court, in its March 19, 1992 opinion, declared violative of the Fourteenth Amendment. *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992). A more complete history of the *Voinovich* litigation appears at n.1 of Appellants' Application for a Stay.

The case was heard by the district court on December 3 and 17, 1991.[4] Following opening arguments on December 3, 1991, each side was allowed only three hours on December 17, 1992, in which to present its case.

On January 31, 1992, the district court issued an Opinion and Order in which a majority of the district court concluded that Appellants were not permitted to create minority controlled state legislative districts without first "justifying" their creation under § 2 of The Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, i.e., establishing that the state legislative districts had diluted minority voting strength in the past, and that the creation of minority controlled districts was "justified" under the "totality of the circumstances" test of *Thornburg v. Gingles*, 478 U.S. 30 (1986). The district court, in essence, shifted the burden of proof from plaintiffs attacking the new districts as diluting minority voting strength under § 2 of the Voting Rights Act, see *Thornburg v. Gingles*, *supra*, to the apportioning officials to show that the prior districts did dilute minority voting strength:

> Accordingly, we find that no adequate totality of the circumstances analysis was performed by the Board. In the absence of such an analysis, there can be no reliable finding of a violation. In the absence of a violation, there was no legal justification for the Board's "remedy" in the form of the wholesale creation of majority-minority districts. Without such a justification, the Board's plan packs minority voters, with dilutive effects that violate the Voting Rights Act.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 14a (N.D.Ohio Jan. 31, 1992). Judge Dowd dissented, finding that Plaintiffs failed to satisfy their burden of proof that the 1991 Ohio plan of apportionment diluted minority

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[4] The court, from the bench and without discussion, denied Appellants' motion for abstention.

voting strength. On February 3, 1992, Judge Dowd issued "Appendix 2" to his dissenting opinion, an appendix consisting of detailed fact findings supporting his dissent. App. 47a.

Appellants, expressly reserving any argument they had that the district court's Opinion and Order of January 31, 1992, was contrary to law, reconvened the Apportionment Board for the purpose of receiving evidence, from both the Board's majority and its minority members, concerning the totality of the circumstances justifying the creation of minority controlled districts under the 1991 plan of apportionment. At the conclusion of the February 18, 1992, session of the Apportionment Board, the Board, by a three-to-two vote, adopted Findings and Conclusions stating that the evidence received "justified" the Board's creation of minority controlled state legislative districts.[5] App. 160a.

On March 10, 1992, the district court, in a two and one-half page decision and again by a two-to-one vote, ruled that Appellants had failed to "justify" the creation of minority controlled districts. In one sentence, and without explanation, the court also found a violation of the Fifteenth Amendment to the United States Constitution:

> As noted in the Conclusion of our January 31, order and opinion, it has heretofore been unnecessary in these proceedings to reach the constitutional issues present, but we now proceed to decide that the plan

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[5] Minor adjustments were made in several of the districts, including some of the majority-minority districts, in order to make several technical corrections to the plan of apportionment as authorized by the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992). Those corrections affected the percentages of minority populations in some of the districts, but the changes were also supported by Defendants' thorough totality of the circumstances analysis. In its decision of March 19, 1992, the district court referred to the 1991 plan of apportionment, as corrected on February 18, 1992, as the "1992 plan."

as submitted is also violative of the Fifteenth Amendment of the United States Constitution.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 119a (N.D.Ohio March 10, 1992) (*per curiam*). Consequently, the court ruled that the 1991 plan of apportionment was unlawful and ordered that a special master be appointed to redraw Ohio's state legislative districts. As previously noted, the district court majority also enjoined the May 5, 1992 Ohio primary election. Judge Dowd again dissented.

On March 11, 1992, Appellants filed their Notice of Appeal to this Court in the district court, App. at 149a, and moved the district court to stay its Order of March 10, 1992.[6] The district court, in an order issued on March 19, 1992, denied the motion for a stay of its March 10, 1992 Order. In addition, however, the court went on, in Part V of its decision, to find that the 1991 plan of apportionment was also violative of the Fourteenth Amendment to the United States Constitution. *Quilter v. Voinovich*, No. 5:91CV-2219, App. at 146a (N.D.Ohio March 19, 1992) (*per curiam*). Accordingly, Appellants also noticed their appeal from the March 19, 1992 Findings of Fact, Supplemental Memorandum of Law, and Order of the district court. App. at 156a. Ap-

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[6] The Notice of Appeal actually listed both the January 31, 1992 Opinion and Order and the March 10, 1992 Order as the orders of the district court from which the Appellants appealed. On March 19, 1992, the parties stipulated to the dismissal of the appeal from the January 31, 1992 Order. App. at 153a. There is no question, however, that the district court's conclusions in its January 31, 1992 Opinion and Order (which were in substantial part reiterated in the March 19, 1992, Order) are properly the subject of this appeal. See *Fusari v. Steinberg*, 419 U.S. 379, 387 n.13 (1974) (holding that an appeal of an order pursuant to 28 U.S.C. § 1253 brings the "whole case" before the Court for review). Cf. *Arthur v. Nyquist*, 547 F.2d 7, 9 (2d Cir. 1976) (noting that "an interlocutory order from which no appeal has been taken merges into the final decree").

pellants also noticed their appeal from the March 31, 1992 Order fixing September 8, 1992 as the primary date for members of the Ohio General Assembly. App. at 325a.

This Court has not yet ruled on Appellants' application for a stay of the district court's Order of March 10, 1992.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. INTRODUCTION.

This case involves several substantial questions concerning the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution as these provisions are applied to a state's reapportionment of its state legislative districts. Specifically, this case involves the ability of state officials to avoid diluting minority voting strength in such redistricting by ensuring that no sufficiently large and geographically compact protected minority group is fragmented between two or more districts. The district court concluded that the majority of the Ohio Apportionment Board was not permitted to avoid such dilution without first conducting a totality of the circumstances analysis adopted by this Court in *Thornburg v. Gingles*, *supra*, a position heretofore not adopted by *any* court. Moreover, the district court erroneously concluded that the totality of the circumstances analysis performed by Board upon remand from the January 31, 1992 Opinion and Order of the district court was insufficient to support the creation of minority controlled districts.

In addition, the district court, initially without any discussion of the element of discriminatory motive, ruled that in addition to violating § 2 of the Voting Rights Act, Appellants violated the Fifteenth Amendment to the United States Constitution. In its opinion of March 19, 1992, the district court attempted to bolster its finding of intentional discrimination by pointing to evidence merely showing that persons not involved in the drawing of dis-

trict lines suggested that the Voting Rights Act be used for political advantage. There was no finding that Appellants accepted the suggested advice, and indeed, any finding of discriminatory motive is contrary to all evidence of record.

The lower court, as an afterthought in its Order of March 19, 1992, also concluded that the plan of apportionment violated the Fourteenth Amendment to the United States Constitution, despite the fact that the "underpopulated districts" had earlier been declared lawful by the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992), and despite the clear state policy of avoiding the crossing of county lines in drawing state legislative districts, a legitimate policy this court has recognized as justifying a total deviation of more than 10% for state legislative districts. *Mahan v. Howell*, 410 U.S. 315 (1973).[7]

Finally, the district court also erred by appointing a special master to reconfigure the districts for members of the Ohio General Assembly without first affording the state a reasonable opportunity to adopt a substitute re-

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[7] In the plan of apportionment as amended on February 18, 1992, the largest house district, House District 20 (Cuyahoga County), has a population of 114,943, or 104.91% of the "ideal population" of 109,567, *i.e.*, one house ratio. The smallest house district, House District 5 (Ashtabula County), has a population of 99,281, or 91.10% of the ideal, for a maximum deviation of 13.81%, *i.e.*, 104.91% minus 91.10%. Ashtabula County was kept as a single whole county house district pursuant to Article XI, §§ 9 and 10(B) of the Ohio Constitution, which permit a county within plus or minus 10% of the ideal population to be designated as a house district.

The largest senate district, Senate District 1 (HD82, HD83, and HD86), has a population of 343,582, or 104.53% of the ideal population of 328,700, *i.e.*, one senate ratio. The smallest senate district, Senate District 32 (HD66, HD67, and HD68), has a population of 308,942, or 93.99% of the ideal, for a maximum deviation of 10.54%, *i.e.*, 104.53% minus 93.99%.

apportionment plan, see *Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978), an action which greatly encroaches upon the state's autonomy and self government. The enjoining of Ohio's electoral process and the fixing of a separate date for the state's primary for members of its General Assembly also encroaches upon the state's autonomy.

II. THE DISTRICT COURT ERRONEOUSLY REQUIRED DEFENDANTS TO PROVE A PAST VIOLATION OF § 2 OF THE VOTING RIGHTS ACT PRIOR TO THEIR CREATION OF MINORITY CONTROLLED DISTRICTS UNDER THE 1991 PLAN OF APPORTIONMENT, THUS SHIFTING THE BURDEN OF PROOF FROM THE PLAINTIFFS TO THE APPORTIONING OFFICIALS.

In its opinion of January 31, 1992, the district court prevented the Apportionment Board from implementing the policy of the state of drawing minority controlled districts without first proving that the prior plan violated § 2 of the Voting Rights Act. The district court found a violation of § 2 because the Appellants did not properly conduct the analysis that this Court prescribed for lower courts to use when assessing redistricting plans. *Thornburg v. Gingles*, 478 U.S. 30 (1986). This determination was erroneous because, as noted by Judge Dowd, the *Gingles* analysis is not a prerequisite to redistricting:

> The majority opinion appears to declare that the Voting Rights Act requires that there be an established violation before an apportionment board is entitled to apportion a district with a significant black population. This argument places the cart before the horse because the totality of the circumstances test, derived from the Voting Rights Act, is a tool that is to be utilized by the district court in evaluating the *plan before it*, and not as a prerequisite to redistricting.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 31a (N.D. Ohio Jan. 31, 1992) (Dowd, J., dissenting) (em-

phasis in original).[8] The district court, in effect, relieved the plaintiffs of the burden of showing minority vote dilution and shifted the burden to defendants by requiring them to show a past violation of § 2 of the Voting Rights Act and/or that their redistricting plan does not presently violate § 2.[9]

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[8] The legislative history of the 1982 amendments to the Voting Rights Act supports Judge Dowd's observation. Congress continually referred to the totality of the circumstances or "results test" as a vehicle for plaintiffs alleging minority vote dilution to attack district boundaries, not as an analysis to be conducted by state officials as a prerequisite to their redistricting. See generally S. Rep. 97-417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.Code Cong. & Admin. News 177.

[9] In its March 19, 1992 Order, the district court attempted to back away from this position:

> Defendants, as well as the dissent from our January 31, 1992 Opinion and Order, distort this aspect of the Court's opinion. They imply that this Court had held that an apportioning board must engage in a totality-of-circumstances analysis prior to any racially conscious redistricting. They similarly imply that this Court held that a state may not anticipate a possible Voting Rights Act challenge and attempt to remedy any potential violation, unless if first analyzes the totality of the circumstances. Neither of these contentions is true.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 130a-131a (N.D. Ohio March 19, 1992) (*per curiam*). Later in the Court's March 19, 1992 Order, however, the district court once again revealed that it did indeed hold that apportioning officials must first conduct a totality of the circumstances analysis prior to any attempt to avoid minority vote dilution:

> If a federal trial court, trained in fact finding and expert at legal analysis, is required to make a "searching practical evaluation of past and present reality" and an "intensely local appraisal of the design and impact of the contested electoral mechanisms," it would seem to follow, a fortiori, that a Board of laypersons, politically motivated, should not be held to a lesser standard. *Whether such a Board is competent in the first instance to make the necessary totalities evaluation re-*

The district court's decision of January 31, 1992, is contrary to every decision relating to the creation of minority controlled districts. The Voting Rights Act has consistently been interpreted to require a state to address the dilution of minority voting in the apportionment process. *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977); *Beer v. United States*, 425 U.S. 130 (1976); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991); *Jeffers v. Clinton*, 730 F.Supp. 196 (E.D. Ark. 1989), *aff'd*, 111 S.Ct. 662 (1991).[10]

In *United Jewish Organizations, Inc. v. Carey*, *supra*, this Court concluded that redistricting officials satisfied their obligation under § 5, 42 U.S.C. § 1973c, "where the reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority." 430 U.S. at 159. The Court in *Carey* further held that "compliance with the Act in reapportionment cases would often necessitate the use of racial considerations in drawing district lines." 430 U.S. at 159. The Court approved the use of racial criteria in drawing district lines under § 5 of the Voting Rights Act:

> [T]he Constitution does not prevent a State subject to the Voting Rights Act from *deliberately creating or preserving black majorities in particular districts* in order to insure that its reapportionment plan complies with § 5.
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> • • • •

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quired by the Voting Rights Act is, of course, an issue that is open to serious challenge, but one that we have answered in the affirmative.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 140a (N.D. Ohio March 19, 1992 *(per curiam)* (emphasis added) (citations omitted).

[10] *United Jewish Organizations, Beer, Garza*, and *Jeffers* are not even cited in either the January 31, 1992, or the March 10, 1992, majority opinions of the district court. The court attempted to distinguish these cases in its March 19, 1992 opinion.

> [N]either the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment. Nor is petitioner's second argument valid. *The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or reapportionment.*

430 U.S. at 159, 161 (emphasis added). Indeed, this Court in *Carey* explicitly held that a State was permitted to creat minority controlled districts in order to avoid minority vote dilution, even if this was done at the expense of white voters:

> If this intentional reduction of white voting power would be constitutionally permissible, as we think it would be, we think it also permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority.

430 U.S. at 167-68.[11]

Similarly, in *Garza v. County of Los Angeles, supra*, the court concluded that "[t]he deliberate construction of minority controlled voting districts is exactly what the Voting Rights Act authorizes. Such districting, whether worked by a court by a political entity in the first instance, does not violate the Constitution." 918 F.2d at 776.

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[11] In its Order of March 19, 1992, the district court distinguished *United Jewish Organizations* and *Beer* by noting that they were § 5 cases, while the present action is a § 2 case, thus apparently concluding that the principles enunciated in these cases are inapplicable in cases commenced under § 2 of the Voting Rights Act. The applicability of these principles to § 2 cases, in and of itself, presents a substantial question which should be addressed by this Court.

Further, contrary to the district court's Opinion and Order of January 31, 1992, it is well established that an apportionment body must address minority vote dilution in the apportionment process without the need to await a prior adjudication. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Garza v. County of Los Angeles, supra; Armour v. Ohio*, 775 F.Supp. 1044 (N.D. Ohio 1991).

Furthermore, the district court's decision is contrary to the recent decisions of the California Supreme Court, federal courts in Illinois and Texas, and the Minnesota Redistricting Panel. In *Wilson v. Eu*, 4 Cal.Rptr.2d 379 (Cal. 1992), the California Supreme Court adopted redistricting plans for the California Assembly, Senate and Congressional delegation after the state legislature's failure to enact plans in time for the 1992 elections.[12] The court, relying upon *United Jewish Organizations, supra*, and *Garza, supra*, adopted the special masters' report, which "attempted to reasonably accommodate the interests of every 'functionally, geographically compact' minority group of sufficient voting strength to constitute a majority in a single-member district." 4 Cal.Rptr.2d at 383. Interestingly, the California special masters' approach was the same approach used by the majority of the Apportionment Board in Ohio:

> In preparing our redistricting plans, we determined that it is important to eliminate, or at least minimize, any possibility of their being challenged under section 2. The ultimate success of any such challenge would depend not only on the composition of the new districts themselves but also on evidence, not now before us, of historic voting patterns or socioeconomic data, and probably also on resolution of open legal questions concerning interpretation or application of the Act. Rather than speculating on such eivdence, or attempting to resolve all such legal is-

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[12] The court essentially adopted the Report and Recommendations of the Special Masters it had earlier appointed to handle the matter. See *Wilson v. Eu*, 54 Cal.3d 471 (1991).

sues, we have endeavored to draw boundaries that will withstand section 2 challenges under any foreseeable combination of factual circumstances and legal rulings.

* * * *

The [*Gingles*] court listed three "necessary preconditions" to the sustaining of a [§ 2] claim:

"First, the minority group must be able to demonstrate that it is *sufficiently large* and *geographically compact* to constitute a majority in a single-member district."

"Second, the minority group must be able to show that it is *politically cohesive*."

"Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."

* * * *

We can avoid section 2 challenges to our new districts by eliminating the possibility of a minority group's proving any one of three *Thornburg* prerequisites. The information from which our districts are drawn is furnished by the 1990 federal census, which tells us, as to each census tract, the total number of persons together with the numbers in particular categories of age, race, and Latino origin. From that data, we can judge whether minority groups are "sufficiently large and geographically compact" to satisfy the first *Thornburg* prerequisite. The second and third prerequisites, however, depend on what analyses of election results would show about a minority's political cohesiveness and about White majority bloc voting. In this area, the federal census is of little help.

We have therefore drawn district lines so as to avoid either (1) unnecessary fragmentation of any sufficiently large, geographically compact protected minority group into two or more districts, or (2) overconcentration of such a group in a single district.

> By thus preventing the dilution of the votes of any minority group that could qualify under the first *Thornburg* prerequisite, we can eliminate the possibility of section 2 challenges regardless of whether a group could fulfill the second or third prerequisite.

4 Cal.Rptr.2d at 397, 399 (footnotes and citations omitted). The California Supreme Court's decision that apportioning officials may create minority controlled districts in order to avoid a successful Voting Rights Act challenge is inconsistent with the district court's holding in this case.

In *Hastert v. State Bd. of Elections*, 777 F.Supp. 634 (N.D.Ill. 1991), the United States District Court for the Northern District of Illinois concluded that "[r]acial and ethnic considerations are appropriate in drawing districts to advance the goals of the Voting Rights Act." 777 F.Supp. at 650-51 (citations omitted).

Similarly, the United States District Court for the Western District of Texas, in refusing to issue a preliminary injunction against the state legislature's Congressional redistricting plan, approved of the use of racial criteria in drawing districts. *Terrazas v. Slagle*, Nos. A-91-CA-425, 426, & 428, App. at 302a (W.D.Tex. Dec. 24, 1991).[13]

In *Cotlow v. Grove*, No. C8-91-985, App. at 287a (Minn. Redistricting Panel Nov. 21, 1991), a special judicial redistricting panel appointed by the Minnesota Supreme Court held that "[w]here a concentration of a racial or language minority makes it possible, the districts must increase the probability that members of the

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[13] The *Terrazas* Court found that the state legislature's plan for redistricting the state house and senate violated the Voting Rights Act by not creating enough Hispanic and African-American districts, and accordingly enjoined implementation of that plan. This Court refused to stay the three-judge district court's decision in the *Terrazas* case. *Slagle v. Terrazas*, 112 S.Ct. 1075 (1992).

minority will be elected." *Cotlow v. Growe*, App. at 291a (emphasis added).[14] The Minnesota court's holding is consistent with the Appellants' position in this case that they did not violate § 2 of the Voting Rights Act by creating minority controlled districts in an effort to avoid a successful challenge to the 1991 plan of apportionment.

Because the district court, contrary to every court which has considered this issue, prohibits state redistricting officials from exercising their legitimate discretion to avoid minority vote dilution and, in effect, shifts the burden of proof to apportioning officials to show the lack of minority vote dilution, this Court should note probable jurisdiction and reverse the decision of the district court.

III. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT DEFENDANTS FAILED, UNDER THE TOTALITY OF THE CIRCUMSTANCES TEST, TO JUSTIFY THEIR CREATION OF MAJORITY-MINORITY DISTRICTS IN THE 1991 PLAN OF APPORTIONMENT.

In its Order of March 10, 1992 the district court compounded its error of January 31, 1992, by concluding, against the overwhelming weight of evidence, that Appellants had failed to "justify" their creation of minority controlled districts, under the totality of the circumstances test of *Thornburg v. Gingles*, *supra*. As Judge Dowd found, the Findings of the Apportionment Board were exhuastive:

> On February 20, 1992 the defendants Voinovich, Taft, and Aronoff filed findings and conclusions with respect to the creation of the majority-minority districts. The findings number 254 paragraphs and 106 pages and address such issues as History of Official Discrimination, Racial Bloc Voting, Racial Barriers to Effective Participation, Effects of Discrimination,

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[14] This Court vacated a three-judge district court's stay of this state court decision. *Cotlow v. Emison*, 112 S.Ct. 855 (1992). This Court recently noted probable jurisdiction in an appeal from the final decision of the federal court. *Growe v. Emison*, 60 L.W. 3669 (1992).

> Summary of Unemployment Rates by Race, Showing Disparate Unemployment Rates as to Blacks, Mean Household Income showing a great disparity between white and black households, an Analysis of Families Living Below Poverty Level, showing great disparity between white and black families, Education Findings, demonstrating that the percentage of blacks that have not completed high school and who have not completed one or more years of college are significantly higher than whites, findings that the value of housing between white families and black families are grossly disproportionate, the effects of overt or subtle racial appeals in the political process, the extent to which minorities had been elected to public office, and the lack of success of minorities in the election process in the major urban counties in Ohio other than Cuyahoga.

Quilter v. Voinovich, No. 5:91CV-2219, slip op. at 1 n.1 (N.D. Ohio March 10, 1992) (Dowd, J., dissenting). Accordingly, even if this Court determines that Appellants were required to satisfy the *Gingles* test as a prerequisite to redistricting, we submit that the decision below was erroneous and should be reversed.

As Judge Dowd noted, the evidence "justifying" the creation of minority controlled districts was overwhelming, yet the lower court majority ruled that Appellants had failed to satisfy their burden of proof. See *Quilter v. Voinovich*, No. 5:91CV-2219, App. at 119a (N.D.Ohio March 10, 1992) (*per curiam*) ("Accordingly, the Board fails once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965."). Thus, the lower court not only ruled that the Board failed to satisfy its *burden* of proof, but by according absolutely no deference to the Board's exhaustive findings, it apparently held the Board to an improperly stringent *standard* of proof. Even if this Court were to rule that a state must "justify" its creation of minority controlled districts prior to their adoption, the standard of proof that

a state, in the first instance, must satisfy in its attempt to comply with the Voting Rights Act, as well as the proper deference a reviewing court must give to the state apportioning body's findings, are substantial questions on which this Court should note probable jurisdiction.

IV. A DISTRICT COURT MAY NOT APPOINT A SPECIAL MASTER TO REDRAW STATE LEGISLATIVE DISTRICTS WITHOUT FIRST AFFORDING THE STATE'S APPORTIONING OFFICIALS A REASONABLE OPPORTUNITY TO ADOPT A SUBSTITUTE PLAN.

In its decision of March 10, 1992, the district court appointed a special master to draw a new plan of apportionment for the members of the Ohio General Assembly. That appointment exceeds the clear limitations imposed by this Court on a district court's remedial powers in reapportionment cases:

> The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt. *When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan.* The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution. "[A] state's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either in whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause."

Wise v. Lipscomb, 437 U.S. 535, 539-40 (1978) (citation omitted) (emphasis added). See also *Burns v. Richardson*, 384 U.S. 73, 85 (1966).

Although the district court suggested that the Apportionment Board failed *twice* to adopt a valid plan, it must be emphasized that the court, in its Opinion and Order of January 31, 1992, did *not* invalidate the 1991 plan of apportionment. Rather, the district court found insufficient evidence to support the creation of minority controlled districts in the plan. Accordingly, the Board was ordered to reconsider the plan to show "justification" for such districts. The Board did exactly that when it reconvened to receive evidence regarding the totality of the circumstances, and when it issued findings and conclusions setting forth the basis for the creation of minority controlled districts.

The district court's determination on March 10, 1992—that the creation of minority controlled districts was not justified, *i.e.*, that the plan is invalid—was thus the first and only such declaration. Contrary to the clear dictates of this Court, the district court did not afford the Board a reasonable opportunity to adopt a substitute plan, which plan would "be the governing law." *Wise*, 437 U.S. at 540. In not affording the Board such an opportunity, as well as in arbitrarily fixing September 8, 1992, as the date of the primary election for members of the Ohio General Assembly, the district court encroached upon the autonomy of the state to reapportion its own state legislature—an autonomy that has long been recognized by this Court. This encroachment raises a substantial question on which this Court should note probable jurisdiction.[15]

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[15] Indeed, at its sessions following the district court's remand of January 31, 1992, the Board considered two alternatives ("Amendment E" and "Amendment F"). Amendment E reduced the relative minority population to approximately the same levels as existed under the 1981 apportionment, while Amendment F reduced the relative minority population in Cuyahoga County districts by creating five, rather than four, minority controlled districts within that county. The Board advised the district court that the 1991 plan as corrected best satisfied the Board's totality of circumstances analysis, but that Amendments E and F were acceptable

V. THE DISTRICT COURT'S HOLDING THAT THE APPORTIONMENT BOARD VIOLATED THE FIFTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS ERRONEOUS AND MUST BE REVERSED.

As previously noted, the district court found in one sentence that the 1991 plan of apportionment violated the Fifteenth Amendment:

> As noted in the Conclusion of our January 31, 1992 order and opinion, it has heretofore been unnecessary in these proceedings to reach the constitutional issues present, but we now proceed to decide that the plan as submitted is also violative of the Fifteenth Amendment of the United States Constitution.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 119a (N.D. Ohio March 10, 1992) (*per curiam*). The district court did not discuss the element of discriminatory motive that this Court has clearly held must be proved in order to establish a Fifteenth Amendment claim. See *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) ("[R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.").[16] In its decision of March 10, 1992, the court pointed to no evidence that Appellants' creation of minority controlled districts was done with any conceivable discriminatory motive.

The district court attempted to bolster its finding of a Fifteenth Amendment violation in its opinion of March 19, 1992:

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alternatives the court could consider. The district court considered neither of these alternatives.

[16] In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Court concluded that "[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part "because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." 446 U.S. at 71 n.17 (citation omitted). See also *Flanagan v. Gillmor*, 561 F.Supp. 36, 45 (S.D. Ohio 1982) (three-judge court), *aff'd*, 467 U.S. 1223 (1984).

> Furthermore, the Board cannot seriously contend that it did not apply its "remedy" intentionally and for political advantage in violation of the Fifteenth Amendment. These facts clearly establish (1) actual intent to discriminate and (2) injury as a direct result of discrimination. It is well established that intentional dilution for political reasons sustains a Fifteenth Amendment claim.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 142a-143a (N.D. Ohio March 19, 1992) (*per curiam*) (footnotes and citations omitted).[17] In its footnotes, the court pointed only to evidence that persons not involved in drafting the apportionment plan attempted to influence Appellants to use the requirements of the Voting Rights Act for partisan political advantage. App. at 142a-143a n.8 & 9.[18]

Indeed, there can be no legitimate finding that minority controlled districts under the 1991 plan of apportionment were drawn with discriminatory motive. As Judge Dowd noted in his dissenting opinion, the Ohio NAACP fully endorsed the minority controlled districts under the 1991 plan of apportionment. *Quilter v. Voino-*

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[17] The district court attempted to apply the sound holding of *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991), but overlooks two key points of that decision. The *Garza* court held that in order for political motivation to be intentional discrimination, (1) the instrument for executing that political motivation must have a dilutive effect on minority voting strength, and (2) the dilutive effect must be known to the political body making the decision. There is no proof of either of these elements in the case at bar.

[18] There is no evidence that Appellants were indeed influenced by these attempts. Indeed, Dr. Gary King, Professor of Government at Harvard University and a nationally recognized expert in the field, testified that the 1991 plan of apportionment has a partisan bias of zero, while the proposed plan submitted by Appellees Ferguson and Quilter was biased in favor of Democrats and the proposed plan submitted by the Ohio Republican Party was biased in favor of Republicans.

vich, No. 5:91CV-2219, App. at 28a (N.D. Ohio Jan. 31, 1992) (Dowd, J., dissenting). Indeed, as conveniently ignored by the majority below, the NAACP submitted a proposed plan of apportionment for Ohio's urban counties, *which plan was fully incorporated into the plan drafted by Appellants.* The only changes to the NAACP plan as adopted, other than the technical corrections made on February 18, 1992, were in Cuyahoga County following negotiations between Appellants, the Ohio NAACP, the Black Elected Democrats of Ohio ("BEDO"), and the Black Elected Democrats of Cleveland, Ohio ("BEDCO"). All of these groups endorsed the final districts in Cuyahoga County. It is inconceivable, therefore, that Appellants adopted the 1991 plan of apportionment because of its adverse effects upon the minority community in Ohio. See *Flanagan v. Gillmor*, 561 F.Supp. at 46 ("The conclusion that no impermissible racial motivation accounted for district line drawing by the drafters of [Ohio's 1981 Congressional redistricting plan] is bolstered by the bipartisan efforts to avoid diluting black voting power in the redistricting of the northeastern Ohio area . . . .").

In light of this factual background, as well as the district court's failure to make adequate findings of discriminatory motive, it is evident that the court simply eliminated discriminatory motive as an element of a Fifteenth Amendment claim. Accordingly, this Court should note probable jurisdiction and reverse the decision of the lower court.

VI. THE DISTRICT COURT'S FINDING OF A VIOLATION OF THE FOURTEENTH AMENDMENT IS ERRONEOUS AND MUST BE REVERSED.

In its decision of March 19, 1992, denying Appellants' motion for a stay, the district court, for the first time in this proceeding, also found that the 1991 plan of apportionment violated the Fourteenth Amendment with respect to three house districts created pursuant to Article

XI, §§ 9 and 10(B) of the Ohio Constitution. Those sections, expressing a constitutional policy of designating single counties as whole house districts where reasonably possible, permit the Apportionment Board to designate a county as a house district when its population is within 10% of the ideal population. The lower court also found that one senate district (Senate District 32), which was approximately 94% of the ideal district ratio, violated the Fourteenth Amendment.[19]

The lower court's findings of a Fourteenth Amendment violation cannot be sustained. The district court, contrary to this Court's well-established analysis for such Fourteenth Amendment violations, found a violation solely because the districts were not within plus or minus 5% of the ideal population:

> Both deviations were justified, erroneously, by the need to observe county lines. It is well recognized that, under the Fourteenth Amendment, standard districting criteria, such as respect for city or county

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[19] Ohio Supreme Court Justice Douglas has suggested that this claim is barred by the doctrine of res judicata. *Voinovich v. Ferguson*, 63 Ohio St.3d at 209-10 (Douglas, J., concurring). The redistricting case before the Ohio Supreme Court, *Voinovich v. Ferguson*, *supra* specifically concerned whether the senate district was within Ohio Constitutional population requirements. The Ohio Supreme Court held that it was. Appellees Ferguson and Quilter, although parties to that proceeding, chose not to assert their Fourteenth Amendment claim, which claim was a compulsory counterclaim. Under the doctrine of res judicata, as dictated by Ohio law, they are now barred from litigating that issue in another court. *Bolles v. Toledo Trust Co.*, 136 Ohio St. 517, 520 (prior action bars relitigation of all claims which were *or could have been brought*), *cert. denied*, 311 U.S. 673 (1940); *Interstate Steel Erectors, Inc. v. H & L Wolff, Inc.*, 17 Ohio App.3d 173 (1984) (failure to assert compulsory counterclaim constitutes res judicata). Federal courts must give the same preclusive effect to state court judgments as would the courts of the state. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986) (citing 28 U.S.C. § 1738). As the Ohio Supreme Court would give preclusive effect to its decision, the district court was required to do so as well.

> boundaries, must give way to the equal population standard if there is an unavoidable conflict. Accordingly, the Board fails to provide sufficient justification for its violation of the 10% total deviation rule.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 148a (N.D. Ohio March 19, 1992) (*per curiam*) (citations omitted).

The district court failed to conduct the analysis required by this Court in *Mahan v. Howell*, 410 U.S. 315 (1973), and *Connor v. Finch*, 431 U.S. 407 (1977). In those cases, this Court concluded that total deviations of less than 10% in state legislative districts were *prima facie* constitutionally permissible, while the state must justify total deviations greater than that amount. The drawing of district lines so as to respect political subdivision boundaries has been held to constitute sufficient justification for some deviation in excess of 10%. See *Mahan, supra; Brown v. Thompson*, 462 U.S. 835 (1983).

The district court in this case performed none of the required analysis, but merely invalidated the 1991 plan of apportionment on the basis of a total deviation in excess of 10%. Such an analysis would have revealed Ohio's longstanding policy to respect political subdivision boundaries where reasonably possible. The Appellants did so in this case with a resulting total deviation of only 13.81%, well within the range approved by this Court in *Mahan*. Accordingly, the decision of the court below that the Fourteenth Amendment has been violated must be reversed.

CONCLUSION

For the reasons stated, Appellants respectfully request this Court to note probable jurisdiction, and to hear this appeal on an expedited basis.

DATED: April 8, 1992

Respectfully submitted,

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